

**Good Samaritan Hospital & Health Center and
Marjorie Ann Richey. Case 9-CA-16564**

December 3, 1982

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On June 30, 1982, Administrative Law Judge Leonard N. Cohen issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ As Members Jenkins and Zimmerman agree with the Administrative Law Judge that the subject matter of the dispute over which employees Richey and Miller were discharged did not make their conduct protected activity, they find it unnecessary to rely on his alternative finding that the manner in which they pursued their complaints rendered their conduct unprotected.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge: This matter was heard before me in Dayton, Ohio, on January 7 and 8, 1982. On August 7, 1981, the Regional Director for Region 9 of the National Labor Relations Board issued a complaint and notice of hearing upon unfair labor practices charges filed on March 16, 1981. The complaint alleges that Good Samaritan Hospital & Health Center, herein called Respondent, on or about October 10, 1980,¹ in violation of Section 8(a)(1), discharged its employees Marjorie Ann Richey and Francel P. Miller because they engaged in protected concerted activities. Respondent filed a timely answer in which it denied the commission of any unfair labor practice.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The

¹ Unless otherwise stated, all dates occurred in 1980.

General Counsel and Respondent filed post-hearing briefs which have been carefully considered.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

At all times material herein Respondent, has been a nonprofit Ohio corporation with an office and principal place of business in Dayton, Ohio where it is engaged in the operation of a hospital. During the past 12 months, which period is representative, Respondent, in the course and conduct of its business operations, received revenue in excess of \$250,000. During the same period, Respondent purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Ohio. Accordingly, Respondent admits, and I find and conclude, that at all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts²

1. Background

For several years prior to 1979, Developmental Learning Program, Incorporated, herein called DLP, Inc., existed as an independent county-sponsored single service agency providing developmental therapy for learning disabled children.³ In the spring of that year, the County Mental Health Board became concerned about DLP, Inc.'s funding requirements and, as a result, entered into discussions with Respondent concerning the possible absorption of that program into Respondent's multiservice mental health center. As a result of these discussions, on October 1, 1979, DLP, Inc., formally became a separate unit in the Children's Department of the Mental Health Center of Good Samaritan Hospital. At the time of this changeover, Respondent hired as its own employees each of the former DLP, Inc.'s staff members. This employee complement was composed at that time of the following individuals: occupational therapists Richey and Miller, assistant occupational therapist Julie Henderson,

² Except where specifically noted, the material facts are not in dispute. Without exception, every witness who appeared before me was a highly educated and intelligent individual who impressed me as being unusually sincere and dedicated to advancing the interest of the children patients. I found alleged discriminatees Richey and Miller as especially possessed with the spirit of tireless dedication to the mission of rehabilitating the children through occupational therapy. Where minor disputes as to the facts do exist, they are the result of simple misunderstandings or faulty memories rather than an attempt by anyone, either consciously or unconsciously, to slant the facts to assist their respective positions.

³ The children in the program have motor or perceptual problems that interfere with their ability to learn.

classroom teachers Barbara Kistler and Sharon Donnelly, and speech pathologist Lisa Tunstall.⁴

Later in the year, Dr. Thomas Gilligan, manager of the children's department, gave the DLP, Inc., staff members the names and education and employment records of three candidates for the position of DLP coordinator. The staff interviewed each of the candidates and subsequently informed Gilligan that, while the staff did not believe that any of the three had the needed background, Michael Carner had the best qualifications of the three.⁵ Carner was hired as coordinator in either late December 1979 or early January 1980, shortly before DLP physically moved from its totally inadequate facilities at St. Mary's School to its then temporary facilities at Maria-Joseph School, a building in or near Respondent's other operations.⁶ At the time of Carner's hire, the staff was assured by Gilligan that they would have an opportunity to review Carner's performance after 6 months.⁷

Commencing in March, certain problems and/or disagreements between the DLP staff and Carner developed regarding his management of the program. Certain of these problems or disagreements, such as the physical condition of the occupation therapist room, the hours of work, and specific location of the DLP's staff were resolved prior to the end of the summer. Certain other problems were not resolved prior to Richey's and Miller's discharge on October 10. These areas included the role to be played by the staff psychologist,⁸ the staff's allegations of Carner's general mismanagement of the program, and the philosophical approach to be followed in the treatment of patients. As much as practical, I will treat the happenings leading to the discharges in question at DLP in a chronological fashion. As noted in footnote 2 above, I found every witness to the proceedings to be a credible individual. Therefore, except where specific-

ly noted, the following account is based primarily on an amalgam of the mutually corroborative testimony of Richey, Miller, Carner, and/or Gilligan, as well as the somewhat voluminous documentary evidence.

2. Problems in the DLP program

On March 14, Carner called a staff meeting to discuss the direction he wanted the DLP to take in the future.⁹ During the meeting, the staff concluded that there were five important issues the DLP needed to address in the next 6 months. These areas were: role description, classroom size *vis-a-vis* client/staff ratios, intradepartmental relationships,¹⁰ interdepartmental relationships, and community linkage. At the close of the meeting it was agreed that Carner and the staff would meet again in a week to discuss these five items. Additionally, it was agreed that each staff member would develop and present at the next meeting his own informal job description.

On March 21 the staff met again with Carner. Unlike the first meeting, the discussion here at times became spirited, if not heated, with many of the staff complaints relating to Carner's alleged mismanagement. Specifically, the staff complained that Carner had indicated that he was intending to give service to clients in other units of the Children's Department. The staff stated that they wanted him to spend all his time in the DLP unit and that it would be helpful if he could assume some of the administrative case management duties. The staff also complained that Maher was not there when either the parents were present or when the children were receiving treatment. Moreover, the staff complained that few of the services being provided by Maher were listed as objectives in the State's grant. Although the record is unclear, it would appear that both Richey and Miller, along with several others, voiced these complaints during this meeting.

The third meeting in this series between Carner and the staff took place 1 week later on March 28.¹¹ Carner explained to the staff that there were several issues and matters that had been the subject of complaints and, although he had given them adequate answers and explanations, the issues did not seem to go away. Carner then stated that how the money that had been left in the DLP bank account at the time it was absorbed by Respondent was spent was none of the employees' concern.¹² Carner added that how he supervised Maher was none of their business. Carner then acknowledged that problems still existed in their physical facilities but that they would be

⁴ Shortly before DLP, Inc. went out of existence, its coordinator, Dr. Cantell, left its employ. During its final several months Francel Miller was DLP, Inc.'s acting coordinator.

⁵ Carner holds a bachelor's degree in psychology from the University of Dayton and a master's degree in education from Antioch College. From January 1977 until he became coordinator of DLP, Carner was employed as assistant coordinator of the Children's Program for Emotional Growth, another of Respondent's programs. For 2 years prior to that employment, Carner was employed as a mental health worker for the Greene County Children's Mental Health Program and for, approximately 5 years preceding that, Carner was employed as a child care worker at the Dayton Children's Psychiatric Hospital.

⁶ St. Mary's forced DLP to move before Respondent had had an opportunity to finalize arrangements with Maria-Joseph for the permanent rental of space there. In February, the lease arrangements were finalized.

⁷ I do not credit Gilligan's denial that he gave no such assurances. He appears clearly mistaken since the entire staff operated as if they were given this right. While the staff may have overstated the right given them to review Carner's performance, I do not doubt that Gilligan, in order to secure their cooperation, said something about their later right to evaluate Carner's job performance.

⁸ Prior to October 1979, DLP, Inc., applied for a grant from the State of Ohio for the purpose of employing a part-time staff psychologist. Shortly after October 1, 1979, a grant of \$16,400 was awarded for this purpose. This figure represented less than 7 percent of DLP's annual budget of approximately \$250,000. Frank Maher, a licensed psychologist, was hired by Carner in January. As will be discussed in some detail *infra*, much of the tension which existed between Richey and Miller on one hand and Carner on the other was the result of what Richey and Miller believed was a misuse of Maher's time in direct violation of the terms of the State's grant.

⁹ In a written agenda for this meeting, Carner indicated to the staff the need for the DLP to integrate itself fully into Good Samaritan's overall program. Additionally, the agenda called for development of a "total service system involving child, family, school, and other support systems."

¹⁰ The role in the department of Staff Psychologist Frank Maher. See fn. 8, above.

¹¹ The following account is primarily based on Carner's testimony which was substantially more detailed than the rather sparse accounts offered by Richey and Miller. No employee disputed Carner's testimony in this regard.

¹² Although the record is somewhat confused on this point, it appears that, prior to this meeting, one or more staff members, including at least Richey and perhaps Miller, questioned Carner about Respondent's "ripping off" those funds for use in other Children's Department units.

corrected in the future now that Respondent had formalized the lease agreement with Maria-Joseph. Immediately prior to the end of this meeting, Carner stated that he did not want to hear any more complaints about "Good Sam," that it was a good place to work and if they did not like it, they should leave.

Although it does not appear to have been discussed at any of the three meetings in March, philosophical differences in the appropriate treatment model to be used at DLP had by this time developed between Respondent's management as represented by Carner and Richey and Miller, the licensed occupational therapists. Richey and Miller in essence believed in a continuation of the intradisciplinary treatment model practiced by DLP. Essentially in this model, which is also referred to as a "medical" model, the various professional disciplines, while communicating with each other, primarily work independently on the individual patient.¹³ Under this approach, the program's coordinator serves in an administrative capacity only.

The other model, which is referred to as the "interdisciplinary model," is less discipline oriented. In this model, each member of the team composed of various disciplines or professions interacts with the other pursuant to a treatment plan specifically devised by all for the individual patient's needs. Under this plan, the team for each patient has its own manager or coordinator.

This difference of opinion on the appropriate treatment approach was not resolved prior to the discharges of Richey and Miller. Respondent during this time basically continued to practice the intradisciplinary or medical model. Since the discharges, Respondent has in large measure adopted and put into effect the second or interdisciplinary treatment model.¹⁴

By this time, in the spring of 1980, another area of conflict involving Carner and Richey and Miller had developed. This conflict involved Carner's desires that they teach the parents certain of their treatment techniques or therapies known as "sensory integration." Carner believed that, by using these easily taught techniques, the parents could work with the children at home. Both Richey and Miller voiced strong opposition to Carner's idea on the grounds that the parents would not have the adequate training to use the techniques and that their misuse could be dangerous. Although this subject was brought up on numerous occasions, neither side was able to convince the other of the correctness of their position. At no time did Richey or Miller teach the techniques in question to the parents.

In early April, Carner prepared 6-month employee evaluations for both Richey and Miller. Overall, Carner rated Richey's performance as "commendable" and Mill-

er's as "competent."¹⁵ However, Carner made some specific comments which reflected on certain attitudinal problems he viewed in the performance of each. For example, in Miller's evaluation he stated:

I believe that Fran needs clearer sense of her responsibilities and a better knowledge of the philosophy and goals of the Children's Department.

Fran is able to assess the needs of her clients and carry out appropriate intervention to meet these needs. I would like Fran to give more consideration to how she resolves intraprogram issues.¹⁶

Carner's comments on Richey reflect the areas of conflict referred to above. For example:

Marge establishes good rapport with clients, her relationship with peers reflect a desire to maintain strict disciplinary links rather than teach her approach to her coordinator. Sometimes exceeds her responsibilities.

* * * * *

Marge impresses me as having a complete understanding of OT and displays an effective therapeutic style in children. I feel that Marge's effectiveness may be limited by a misunderstanding or reluctance to accept the philosophy and goals of the Children's Department.

* * * * *

Marge appears very adaptive in her treatment approach. Marge seems less adaptable to changes necessitated by DLP's move to Good Sam and by the introduction of a mental health component.

And finally:

I would like Marge to develop more commitment to the Children's Department and work toward adopting her fine skills to the Dept.

In the employee comment side of the evaluation form, Richey objected to Carner's negative comment as follows:

I believe I am aware of the strongest supporters of interdisciplinary cooperation in the program. I have approached the coordinator with ideas and opinions because I was asked for them. My adaption problems are *not* related to Good Samaritan or the Mental Health aspects but to the coordinator. I believe his negative rewards are a result of his being grievously out of touch with the program staff, clients and caretakers, this would apply also to positive rewards in their evaluations.

¹³ The intradisciplinary approach referred by Richey and Miller was consistent with their freely expressed view that developing the patient's muscle tone, reflexes, and motor coordination was the key to treating and correcting the patient's developmental deficiencies. They believed that, without development in these areas, little progress could be made by other disciplines. Both also believed that over the years other disciplines had "ripped off" approaches developed by and for occupational therapists.

¹⁴ See discussion *infra*.

¹⁵ The five choices on the form were: unsatisfactory, adequate, competent, commendable, and outstanding.

¹⁶ Carner also noted that "Fran generally maintains effective working relationships with peers and supervisors."

In mid-June the DLP staff, in preparation of giving Carner the aforementioned 6-month evaluation, met among themselves.¹⁷ They decided that they needed to meet with Carner to discuss specific problems.

The meeting with Carner took place on June 17. The staff brought up and discussed with him four main problem areas: (1) Carner's administration of the grant, i.e., the wide divergence in Maher's duties from the grant's guidelines; (2) Carner's relationship with staff, clients, and parents, i.e., lack of involvement and understanding of the program; (3) his general administrative ability; i.e., unorganized handling of securing supplies and equipment; and (4) his weak advocacy for staff, clients, and program. After a lengthy discussion, Carner got upset and told the staff that they were his employees and they should do what he said. Carner then added that the program did not really belong in a mental health center and that it was going to die anyway.¹⁸

By letter dated June 23, the staff wrote to Gilligan and asked him to act as a mediator. In addition to reciting the four main problem areas, this letter stated: "We have asked to meet with you because of our continuing dissatisfaction with Mike Carner's performance as the coordinator of DLP Immediate action is requested because constructive continuation of the program is being hampered."

Pursuant to this request, the five-member staff met with Gilligan on June 26,¹⁹ and there ensued a frank and detailed discussion of the four main areas outlined above.²⁰ Gilligan suggested that they adjourn for a week or so and attempt to find answers or solutions that would improve the situation. Additionally, during the course of this meeting, the staff requested that Gilligan intervene and countermand certain directives Carner had previously announced would be effective July 1. These actions by Carner were changing the work hours by one-half hour; moving his desk from the first floor near the classroom to the second floor near the occupational therapists' room, with the result that Richey's desk would be moved away from Miller and Henderson's area; and his rejection of the staff's earlier suggestion or proposal that they be given more planning time between the summer and fall session and at Christmastime. Gilligan, who testified that these actions had been taken by Carner only

after consultation with him, informed the staff that he would not intervene.²¹

By letter dated July 8, staff members wrote to Gilligan suggesting a meeting for the following day. After reciting the staff's past frustrations in dealing with Carner, the letter concludes with the following paragraph:

This situation because of its long history and pervasiveness is beyond ordinary conflict management strategies. We believe an emergency situation exists and as a result DLP is no longer serving its clients or the community well. We request that priority be given to this matter. It is vital that resolution occurs in a matter of weeks. Mike has had six months and ample opportunity to work out these problems and has not done so in spite of our efforts. We would like to suggest August 9, 1980, as a date by which time Mike must successfully execute his job as measured by the criteria which can be agreed upon by all the parties. At that time we would like to submit a written evaluation of Mike's performance.

After Gilligan received and read the staff's letter, he called Carner and Jack Loschert, one of his assistants, into a meeting. The three met for most of the day on July 8 in an effort to come up with some solution to break the apparent deadlock and put an end to the polarization that existed between the staff and Carner. The three came up with the proposal that one of the current staff would be selected as assistant coordinator so as to give the employees a greater voice in the decisionmaking process.

Gilligan, Loschert, and Carner met with the DLP staff on the following day. At the start of the meeting Gilligan presented the proposal regarding an assistant coordinator. This proposal was immediately rejected by the various staff members, including Richey and Miller. According to the employees' view, such a change would not work since they had already helped Carner a great deal. Additionally, they felt that making someone his assistant would merely take away time from that individual's clinical duties. Moreover, it was noted that it would be unreasonable to have two people in an administrative capacity of such a small program. Gilligan mentioned the polarization between the staff and Carner, but rejected the staff's recommendations listed in their letter of July 8. Gilligan then indicated that he did not wish to discuss past problems, but instead wanted to talk to them about future actions. The staff disagreed and told him that they could not talk about the future without talking about the past. This lengthy meeting ended without any agreement on where or how matters should proceed.

On the following morning, Gilligan received a call from David Van Wert, the personnel manager. Van Wert told Gilligan that he had received a telephone call the prior afternoon from a DLP employee who talked to him about certain problems with the program.²²

²¹ Although the record is somewhat unclear, it appears that Richey attempted to use Respondent's policy on "rescheduled time" as a way to continue to work her previous hours.

²² Van Wert did not testify, and Gilligan did not testify as to whether Van Wert identified this caller. Richey testified that she had called Van Wert.

Continued

¹⁷ By this time, classroom teacher Sharon Donnally had resigned and had not yet been replaced.

¹⁸ Carner explained at hearing this last remark by stating that he was attempting to communicate to the staff that the DLP was on shaky ground due to its failure to be fully integrated into Good Sam.

In his agenda of March 14, Carner had stated:

We have the freedom to operate, even at a deficit so long as we are running an efficient operation, and make every reasonable attempt to collect billables.

Finally, I want to emphasize there are no convert plans regarding DLP. But we can't sit on our laurels either. We must provide a quality service that is in demand and is at least competitive with other similar services.

¹⁹ Carner was not present at this meeting.

²⁰ Prior to this meeting, the staff prepared and hand-delivered a six-page, single spaced, typed memorandum setting forth in detail examples of Carner's alleged mismanagement in the four specified areas.

At this point, Gilligan went to Carner and told him of what had happened. Gilligan then stated that it was time for management to make a clear statement to the staff. Carner called together the DLP staff, and Gilligan addressed them for a few moments. Gilligan told the staff that in his opinion the staff had the problem backwards. They were attempting to tell him and his supervisors how to run the program when in fact it should be the other way around. Gilligan further stated that the DLP was part of Good Sam and that it had a Good Sam philosophy, direction, and goals. Gilligan then closed the meeting by telling the staff that Carner was their supervisor, that he (Gilligan) knew and approved of Carner's plans, and that the staff was to stop complaining and start performing under Carner's directions.

Following this meeting, Tunstall called Van Wert and asked him to meet with the staff. Van Wert suggested that they should make an appointment to speak to John Davis, the director of the Mental Health Center and Gilligan's immediate supervisor. This suggestion was followed and a meeting with Davis was arranged for July 16.

Prior to the meeting with Davis, the DLP staff members prepared and submitted a three-page, single-spaced letter summarizing their views on the substantial problems that existed with the program and what they viewed to be the inadequate responses to their complaints by Carner and Gilligan.²³

On July 16, the five-staff members met with Davis and his assistant, Ron Nelson. At the start of the meeting the staff took turns describing the problem areas that they had with Carner's administration. After some discussion Davis asked what they wanted to see in a coordinator, and Richey answered that there were three areas in which they wanted help: (1) someone to facilitate their jobs by seeing that they had adequate space and supplies; (2) someone to "interface" with Good Sam and interpret its policies; and (3) someone to act as an advocate for the program.

Richey also brought up the issue of administrative supervision versus professional supervision that had been a problem with Carner in the past. Richey repeated to Davis what she earlier told Carner with regard to supervising of the occupational therapist assistant—that it was the responsibility of a registered occupational therapist to professionally supervise the work of an occupational

therapist assistant and that Carner did not or could not accept this concept.

Richey also mentioned the conflict she and Miller had with Carner over his suggestion that they teach the parents sensory integration techniques. Richey explained that they had not objected to helping the parents with suggestions and recommendations, but they did not feel it was appropriate to teach them techniques they would not be qualified to give to the children. Several other matters, such as past problems with getting reimbursements for expenditures, the lack of publicity for the program, the problems they were having getting the occupational therapists' room properly set up and equipped, and the overall problem with the grant implementation, were discussed. The meeting ended with Davis agreeing that he would meet with them again at a later date.

On July 22, Davis issued a memorandum to all members of the staff indicating a desire to meet with them on July 30 to discuss DLP management and evolution.

In preparation for this second meeting with Davis, the staff prepared and submitted to him a two-page letter with accompanying attachments regarding the grant. The letter states in pertinent part:

Since our last meeting we have obtained copies of the three quarterly reports of the grant under which Frank is working. The contents of these reports give a very favorable report of Frank's performance, but we think his performance has been unsatisfactory. This is very disturbing to us considering our view of his performance. This causes us to have even more questions about Mike's administration and supervision of the grant. The staff was asked by Mike individually to provide input to Frank's 6 month performance evaluation requested by the hospital. Even though we did this independently, when discussing it later, we discovered we had all rated his performance as inadequate on most items.

These quarterly reports contain not only unsupported claims, misrepresentations of the truth, and material very subject to individual interpretation, but contain statements which are not true. These reports, in our opinion are continuing evidence of poor judgment on Mike's part as well as unprofessional, if not unethical behavior on Frank's part (if he is in agreement with the statement). [Emphasis supplied.]

On July 30, Davis, Gilligan, Carner, and other management officials met with the DLP staff. Early in the meeting Lisa Tunstall complained that the staff had great difficulty in providing input into decisions when in the past Carner reacted negatively when such input was provided. At this point, Carner indicated that his goal for the program was to bring it up through publicity and recruitment to a maximum level by December. The employees commented that they felt December was too late and that Carner's solution for recruitment had not proved successful or productive in the past. Richey then attempted to bring the grant issue up for discussion; however, Davis indicated that he did not want that discussed. Miller then mentioned that Carner had changed

Wert after the first meeting with Gilligan. According to Richey's credited account, after she first explained the problem to him, Van Wert stated that, if the issues were not settled with Gilligan, the employees could talk to personnel. Richey either apparently simply misplaced this first telephone call with Van Wert or she had a second telephone call with him after this meeting as well.

²³ At this same time, Richey and Miller submitted a memorandum to Carner complaining about the lack of air conditioning and other physical problems with the occupational therapists' room. As this memo accurately recites, Richey and Miller had voiced these and similar complaints to Carner about the OT room on an ongoing basis since they moved into the Maria-Joseph facility. Initially, Respondent was unable to make any substantial improvements due to the temporary nature of their occupancy. Once the lease with Maria-Joseph was signed, Respondent slowly and with much prompting by Richey and Miller began addressing their concerns. The room was not adequately fixed and furnished until sometime late in the summer. Once this was accomplished, the problem with the OT room ceased to exist as an area of conflict between Carner, Richey, and Miller.

the working hours and that this had caused difficulties for the staff members. She also complained that excessive amounts of time were spent in administrative meetings with Carner and that it was difficult to get their clinical work done because of these meetings. Davis, after some discussion, indicated that they would have to come up with some ways to address the problems that had been under discussion. The meeting ended with Davis indicating he would meet with them again and try to determine how to set up a system to see that the program would move in the direction they wanted.

On the following day, Richey called Ron Nelson, who had been at the meeting on July 30, and asked if she could meet with him for an off-the-record discussion. He agreed, and the two met in Nelson's office. Richey stated that she wanted to apologize if she had seemed negative during the meeting and that she realized that Davis was working very hard to reach a solution. She also indicated that she was concerned about trying to make the program go when Carner never admitted any responsibilities for any of the problems that existed. Richey again criticized Maher's role and stated that she was torn between her duties as a citizen and her loyalty to Good Sam. Nelson suggested that she speak with Carner about these problems on a one-on-one basis. She agreed to try it.

In the following week, on either August 4 or 5, she spoke privately with Carner. Richey stated that she did not apologize for being angry with him, but she did apologize if she were hostile, that being hostile did not resolve their problems. Carner answered that he perhaps had not provided an atmosphere where people could do their work. She commented that, if he could say that to the rest of the staff, it might help alleviate some of the bad feelings that existed. Richey also stated that getting some of those feelings out in the open would help. Carner replied that feelings were certainly going to have to change for things to move ahead.²⁴

The third and final staff meeting with Davis occurred on August 8. Gilligan was not present. This initial portion of the meeting was spent in again discussing Carner's authority and his perceived inability to accept input from the staff. Lisa Tunstall suggested that the number of staff meetings with Carner should be reduced from 8 hours a week to 1-1/2 hours, and that Carner's one-on-one meetings with each staff member be eliminated altogether. The discussion then turned to the subject of how they were going to evaluate whether these steps, as well as the additional attempts at communication, were helping or not. After some discussion it was agreed that each staff member would submit to Davis a monthly report evaluating the program.

A few days later, on August 12, Carner held a regular DLP staff meeting. During the course of this meeting Richey once again brought up the subject of the grant. Both she and Tunstall indicated that the objectives of the

grant were not being carried out. Either during this meeting or shortly thereafter, Richey further told Carner that the reports Respondent filed with the State regarding the grants were not accurate and that he should send in amended reports reflecting what actually happened.

On August 29, Richey went to Columbus, Ohio, and spoke to the staff of the State Mental Retardation Development Disabilities Department regarding the grant. During this meeting she indicated that she felt that Respondent was not carrying out the objectives of the grant.²⁵ She was told representatives of the department would be making an onsite visit in early September and would speak to her again.

That same day while in Columbus, Richey also paid a visit to the State Board of Psychology and reported that she believed that Frank Maher was engaged in unethical conduct.

On September 8, both Richey and Miller submitted their monthly evaluation of the DLP program.²⁶ Richey's, which consisted of six single-spaced typed pages, stated in pertinent part:

... I am beginning to realize that I have been trying to spare myself the pain of openly saying that I do not think Mike has the competence necessary to be the coordinator of DLP. I hoped someone would read this message into the words both written and oral which we as the staff as well as I personally have communicated then I would not need to say. It is difficult for me for others to think I am being unreasonable or unfair because I do not see myself as being this kind of person

* * * * *

Because I say that Mike is not competent for this job do [sic] not mean I haven't tried or other staff members haven't tried to help Mike . . . we have. Things have not changed because we cannot change Mike. I have found no way to work around him. He is always there making my job more difficult rather than easy. He is an impediment rather than an advocate and facilitator.

* * * * *

It is my recommendation that Mike be replaced immediately, preferable [sic] with an individual representing one of the disciplines in the program. [Emphasis supplied.]

Miller's four-and-a-half page handwritten report reviews in detail five areas in which she finds fault with Carner's performance as the coordinator of the DLP program. As a conclusion Miller ends her report with the following statement:

²⁴ Prior to her going to Columbus she discussed her plan with the other members of the staff.

²⁶ While other staff members also submitted evaluations in early September, the record does not disclose the substance of their views.

²⁴ Either during this conversation or in a subsequent conversation with Richey during early August, Carner suggested bringing in Roger Fortman, a coordinator in another department, to act as an objective third party in an effort to resolve some of the differences that existed between Carner and the staff. Richey rejected this suggestion out of hand on the grounds that Fortman was a friend of Carner's and, therefore, would not be impartial.

I am doubtful that this problem is going to be resolved so long as Mike Carner is the coordinator of DLP.

On September 11, a representative of the State Mental Retardation Development Disabilities Department made an onsite visit during which they met with Richey, Miller, Tunstall, and Henderson. The DLP staff reiterated Richey's earlier complaints regarding what they perceived to be Carner's inadequate reports about the use of the grant money. While no management officials were present during these meetings both Gilligan and Carner knew that they were taking place and both correctly assumed that they involved employee complaints about their management of the grant.

By summer the atmosphere within the DLP had deteriorated to the point that Carner's relationship with his staff generally, and with Richey and Miller specifically, can best be described as an adversary relationship fraught with near constant tension, stress, and anxiety.²⁷ There was virtually no casual or spontaneous conversation between Carner and the staff members. Nearly all communications between the two sides were handled either in writing or at official staff meetings.

This unhealthy atmosphere that existed at this time is ably demonstrated by the testimony of Barbara Waterson, who was hired as a teacher in August. Waterson credibly testified that on her first day of employment in a meeting with the rest of the staff she was asked if she knew "what a jerk" she would be working for. Waterson further testified that after about a week she was asked by Richey if she were going to choose sides. Waterson replied that she would not.

Richey and Miller were due their yearly evaluations on October 1. In anticipation thereof, they were requested as per the normal procedure to prepare and submit self-appraisal forms. Richey submitted hers, which included some five handwritten, single-spaced pages, on September 29 and Miller submitted hers on October 2.

In Richey's self-appraisal she specifically objects to having her performance evaluated by Carner. In support of this objection Richey states:

I do not feel a fair evaluation will be done by this individual because in the past (all that I have on which to make a judgment) he has demonstrated an inability to accept criticism in a mature manner or to constructively plan or plan at all for problem resolutions Thereafter he began (my perception) to personally harass me by attempting to goad me into insubordination (my perception) in that he hoped to be able to fire me. This person who is to evaluate my performance has not planned with staff to resolve issues brought to his attention four months ago. In addition my supervisor knew very little about what I do or why. He has observed me doing therapy one hour in 9 months he has been with the program He does not appear to value what I do or care about what I do although I feel I have spent large amounts of time early in his

tenure as coordinator in an effort to educate him. It will be most inappropriate for him to do my evaluation.

In another portion of her self-evaluation she accuses the management of Respondent in engaging in unethical practices surrounding the administration of the grant. Richey states:

Facts about improper grant administration and implementation and false grant reports have been communicated to the administration by staff including myself for 4 months. No direct response has ever been made to staff or plans that we know of made for correction. An administration that is unresponsive to this type input creates a very poor atmosphere in which to work.

Still later Richey states:

Poor management has been reported repeatedly to administration by the staff of this program including myself for 4 months. That this much time has lapsed without significant change suggests to me that priority has been placed on other than quality programming, the welfare of Good Samaritan clients and employees. It is extremely difficult to achieve my goals and improve my performance under these circumstances.

In Miller's self-appraisal she stated that Carner has not provided an atmosphere in which she could do her job effectively. She notes in this regard:

The atmosphere in this program and in the children's department is one of continual stress and frustration. It has been surprising to me that I have been under this much stress while working in a mental health center. This stress has come not from the clients or my fellow workers but from my supervisor Mike Carner and other persons in the administration. My own mental health and physical well being have suffered considerably.

I have always enjoyed this job and have worked for the program for 4 years. Under my present supervisor my job is being very difficult and what was an enjoyable job is now miserable. [Emphasis supplied.]

On or about October 8, Richey submitted her second monthly evaluation.²⁸ This report consisted of six-and-one-half handwritten, single-spaced pages. In this report Richey states:

It does not appear to me that there is anything which will convince administration that Mike is not doing an adequate job. It appears to me that a decision has been made to keep Mike in this job regardless of what is pointed out about his functions—perhaps with the knowledge and hope that the staff will eventually get weary of no response and give

²⁷ By this time the only remaining members of the original DLP staff were Richey, Miller, Henderson, and Tunstall.

²⁸ It does not appear that Miller submitted a report for October.

up and perhaps leave . . . *DLP deserves better than a coordinator with little potentials for the job who is constantly being trained and coached.* Mike is mechanically and awkwardly carrying out the job—no better or worse than previously. [Emphasis supplied.]

In anticipation of preparing the yearend evaluations of Richey and Miller, Carner, during the early part of October, met with Gilligan to discuss the situation. By this time they had both seen the employees' self-appraisals, as well as Richey's second report. These documents strongly indicated that Richey and Miller were unwilling or unable to accept Carner's continued supervision. On or about October 9,²⁹ Carner and Gilligan met with Davis and his assistant, Nelson, to discuss the situation. At this meeting, as well as at an earlier meeting, both Carner and Gilligan voiced the recommendation that both Richey and Miller should be discharged. Davis suggested that Carner and Gilligan discuss the matter and their options with Dan Leary, the director of personnel.

Later that same day Carner and Gilligan met with Leary and discussed the situation with him at length. During this meeting the decision to immediately discharge Richey and Miller was reached. On the following day Richey and Miller were individually called into Gilligan's office and informed of their termination.³⁰

Both Carner and Gilligan testified at some length as to the reasons for the terminations of Richey and Miller. In explaining his recommendations, Carner stated:

The primary reason for their termination was the situation between myself and them had become so polarized that it was really impossible to work them any longer, to make any kind of progress with them in terms of supervision, program planning, virtually any decision I would make was unacceptable regardless of what it was and the situation just got to the point where it didn't seem like there was anything that could be done.

* * * * *

I guess the difference was that at least some of them I was able to sit down with and continue to communicate with and I found in the instance of Marge and Fran that there just did not seem to be any communication whatsoever.

And for instance in program meetings that we would have it got to the point where for one thing the same issues were constantly being concentrated

on and there was no—there seemed to be no way of progressing and discussing anything different than these points that had been previously mentioned in testimony and I believe that that was particularly true in respect to Fran and Marge . . .

* * * * *

And in the instances Fran and Marge I felt like I was being stonedwalled [sic] and I tried a lot of different approaches throughout that year to try and resolve these problems. I felt like they went nowhere.

Still later Carner testified:

I was lost, to be very honest. I felt like I had tried everything that I could do and I felt that so many other administrators in the mental health center had also been involved and had seemed to be equally unsuccessful in resolving the issue I didn't have any idea where to go.

* * * * *

Our feeling was based upon history of events over the past year, that putting the employee on probation would have made no difference. As an example the responses that we received on Ms. Richey's 6 month evaluation essentially indicated that she neither accepted criticism or strengths that was listed on the evaluation, sort of said to us, what difference will it make—if they are not going to accept what we have to say then stretching it out another 3 months or however long it would take doesn't—seem to be sort of meaningless.

Gilligan described his rationale in slightly different terms:

I believe from my own experience and his [Carner's] reports and from the reports of other staff that there was just a continued unrelenting negative attitude on the part of these two employees toward our whole concept, philosophy, theory, desire of direction for the program. And I believed at that point Mike and I honestly had tried everything either one of us could think of to break that deadlock, to find creative, constructive alternatives that would help move there and get the program developing, moving, going down the right track; [we] could see no real creative alternatives.

Subsequent to the discharges the DLP under Carner's continued leadership evolved into a more "interdisciplinary" approach than had existed during DLP's first year. Under the new approach the staff designs a treatment plan for each child and every other week the DLP staff meet for a case conference where they review certain cases. Additionally, every 3 to 6 months the staff write up new goals and treatment plans for the patient and discuss how much progress, if any, had been made during the past review period.

²⁹ Gilligan's testimony with regard to the timing of the events leading up to the discharges of Richey and Miller was sharper than that of Carner.

³⁰ Later that same day, October 10, Respondent received a letter dated October 7 from the State Department of Mental Retardation and Developmental Disabilities. The letter stated that as a result of the onsite visit it was determined that satisfactory progress had not been made in Respondent's meeting the grant's objectives. The letter further stated that Respondent had the choice of either returning the entire grant or employing a qualified psychologist for 6 additional months.

Respondent subsequently appealed this ruling and, in July 1981, the State reversed itself and found that Respondent had indeed satisfactorily met the objectives as outlined in the grant proposal.

B. Analysis and Conclusions

The General Counsel contends that in complaining about the management of DLP, occupational therapists Richey and Miller were at all times engaged in protected concerted activities under Section 7 and that Respondent's action in discharging them for engaging in such activities violated Section 8(a)(1). While Respondent generally concedes the "concerted" nature of Richey and Miller's conduct, it nonetheless contends that their complaints went well beyond the legitimate concerns of employees regarding their wages, hours, and working conditions, and, thus, fell outside the protective mantle of Section 7.

The litany of Richey and Miller's complaints to and about Carner during the final 7 months of their employment were many and varied. Except for having contributed to the general confrontation atmosphere that existed between them and Carner, many of these issues such as the adequacy of the occupational therapists' room, the scheduled hours of work, and the physical locations of the employees' desks were by the end of the summer resolved. Thus, they ceased to be viable issues. This is not to say that these matters, as well as the employees' accusations that Carner misused the DLP funds by spending them on other children programs, did not influence each side's view of the other's judgment and abilities. Richey and Miller clearly brought away from their discussions with Carner the opinion that he was a poor administrator who was simply incapable of successfully managing the DLP. For his part, these confrontations helped convince Carner and subsequently Gilligan of Richey and Miller's intractable and rigid positions and their general unwillingness to be the team players Respondent desired.

Certain other issues such as Richey and Miller's continued refusal to teach the parents "sensory integration" techniques, though never resolved, were so remote in time that, except for the respective sides' continued hardening of their unfavorable opinion of each other, they played little, if any, specific part in the ultimate discharge decisions.

I now turn to a discussion of those items or issues which it seems clear to me did lead Respondent to believe that it was justified in severely disciplining its two occupational therapists on October 10. From the very first meeting in March with Carner and continuing until their discharge, the key issue for both Richey and Miller was Carner's role in supervising the part-time psychologist, Dr. Maher. Each fervently believed that Carner not only misused Maher's professional skills but more importantly that his utilization of Maher was in direct violation of the objectives of the State's grant. Moreover, each further deeply believed that Carner's reports to the state agency contained so many inaccuracies and falsehoods as to render these reports fraudulent. Their positions with regard to Maher and the grant were freely expressed to Carner, Gilligan, Nelson, Davis, Loschert, and Van Wert on many separate occasions. In at least several of the meetings in which they raised these matters, Respondent's officials listened to and rejected their arguments and suggested in rather strong terms that they did not wish to discuss the matter further. Despite Respondent's clearly announced disinterest in further discussions with

the employees concerning Maher's role in the program, Richey and Miller persisted in protesting to Davis and others what they believed to be Carner's dishonest handling of the grant. Their views of Carner's performance or lack thereof in this area clearly influenced them in concluding that Carner was an inept and inexperienced administrator. Although they originally recommended in July and August that Carner in essence be placed "on probation," by October they both had changed their views and now strongly recommended that he be replaced immediately. In making this recommendation to Davis, both Richey and Miller concluded that Carner's continuing presence as DLP coordinator interfered with the efficiency and effectiveness of the entire program.

Moreover, Richey and Miller's complaints to Davis were not limited to criticisms of their immediate supervisor, Carner. Both made repeated references to Gilligan's perceived unwillingness and/or inability to take corrective action about the untenable situation that then existed at DLP. As Richey stated in her evaluation, she viewed Gilligan's unwavering support of Carner's management as evidence that Gilligan had no intention of exercising any positive influence on the situation.

While, as noted above, other issues and factors influenced both Richey and Miller in recommending to Davis that Carner be discharged for mismanagement, the key focal point of their criticism was from the very first and remained at all times his handling of the grant.

Specifically, their complaints centered on Maher's lack of contact with either the patients or the patients' parents and the blatant inaccuracies in the report filed on these activities. There is no showing whatsoever that, however Maher's time had been used, it would have impacted in any substantial or material manner on Richey and Miller's working conditions. Although the same cannot be said with certainty with regard to some of the other issues raised by Richey and Miller in September and October,³¹ it is abundantly clear on the entire record before me that Richey and Miller were in no way disturbed or troubled by any personal demands that may have been imposed on them by Carner's policy decisions.³² What they readily conceded they were concerned with was the quality of care offered by the program and the welfare of the children. Richey and Miller's energies were not directed to improve their lot as employees,³³ but were instead an effort on their part to affect the ultimate direction, philosophy, and managerial policies of Respondent. As such, their criticisms and recommendations related to disputes outside the objectives of the mutual aid or protection provisions of the National Labor Relations Act.³⁴

³¹ Some of the other issues raised by them were the number of patients admitted to the program and the concomitant efforts undertaken by Carner to recruit patients, the inadequate communication by Carner to the parents, and the general lack on Carner's part to accept input from the DLP's staff.

³² In this regard, Richey and Miller's suggestion to increase the patient load would have required more, not less, work on their part.

³³ *Eastex, Incorporated v. N.L.R.B.*, 437 U.S. 556, 567 (1978).

³⁴ *Lutheran Social Service of Minnesota, Inc.*, 250 NLRB 35, 41-42 (1980); *New York Chinatown Senior Citizens Coalition Center, Inc.*, 239 NLRB 614 (1978). Compare with *Philander Smith College*, 246 NLRB

Continued

Moreover, even if I were to conclude that Richey and Miller's complaints were protected by Section 7, I would nonetheless conclude that the manner in which they sought to exercise those rights would not be safeguarded.

Lutheran Social Service of Minnesota, Inc., supra, presented a case of a similar nature. There the employer, a treatment and custodial home for emotional, troubled, and socially maladjusted children, appointed a new assistant director who instituted certain policy changes regarding the manner in which the children would receive treatment. From the start, the new assistant director was met with objections to his policies by the entire staff, however, principally from two counselors. Over the course of less than 4 months, these two counselors, on a continuous and daily basis, voiced their criticisms and objections to the assistant director's management. At times they did so in profane terms in the presence of the children. By the time the employer discharged the two, the situation had disintegrated to the point that the dissenstion they caused had "wrecked havoc throughout the Home."

After first concluding that the criticism by the two counselors related to matters outside the objectives of the mutual aid or protection clause of Section 7, the Administrative Law Judge, with apparent approval of the Board, concluded that in any event the manner in which they sought to express their concerns would have rendered their conduct unprotected. In so finding, the Administrative Law Judge stated:

... their behavior appears to have been essentially aimless and undirected, consisting of unremitting complaining about the value of management policies and the competence and good faith of their managers and coworkers. It may be that their activity was concerted, that it had a purpose, and that the purpose was of a kind protected by the Act. Even if I were to indulge all those assumptions, it would seem that, in the given circumstances, a point was reached when, particularly in view of the directionless nature of the carping, it was properly thought that too much was enough.

* * * * *

Labor disputes may well engender passion, dissenstion, and discord; the statute says "so be it," as long as the dispute involves collective action legitimately undertaken in support of lawful ends. Here the collective behavior was not the stuff of which "labor disputes" are normally made; it was blind, aimless caviling. *The faultfinding was pressed to the bitter point at which other employees became "sick and tired," dreaded going to work, and thought of resigning. In a place of employment where the mission is to*

499, 505 (1979), where the employees' complaints involved decisions by the college's president on salaries, hiring, promotions, and firing within their department.

repair distressed young lives, where harmony and accord must certainly be of critically greater significance than in an ordinary industrial setting, disruption of that requisite environment by unstinting criticism deserves close consideration. [Emphasis supplied.] [250 NLRB at 43.]

Administrative Law Judge Ries' conclusions and observations are equally applicable to the instant case. Even under the most strict intradisciplinary model, cooperation and communication between and among the DLP's staff, including Carner, was essential to the effective treatment of the patients. It is conceded by all that by the fall the opposite of the desired atmosphere existed at the DLP. Although there were originally six staff members who were involved in voicing their criticisms of Carner, by early October, only the discriminatees, Henderson and Tunstall, remained. Of this group it was apparent to all that Richey and Miller were the two most responsible for creating the negative and intense atmosphere. It clearly had reached the point that Respondent had to take drastic action. In reality, only two alternatives existed—discharge the two employees who by their constant criticism were the main causes of the tension which adversely affected every staff member or give in to the employees' complaints and remove Carner from supervision. Respondent's many efforts to bridge the gap between Richey and Miller on one hand and Carner on the other had failed. The several meetings conducted between the staff and higher management had not narrowed the differences that existed between the two sides. Instead, by October the situation had, by all accounts, substantially worsened. In these circumstances, it was entirely unrealistic not to expect Respondent to take drastic corrective action. Accordingly, I find that the discharges of Richey and Miller do not violate the Act.

CONCLUSIONS OF LAW

1. Good Samaritan Hospital & Health Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent did not violate the Act in any respect as alleged in the complaint.

Upon the foregoing findings of fact, and conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³⁵

The complaint is hereby dismissed in its entirety.

³⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.